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August 18, 2000

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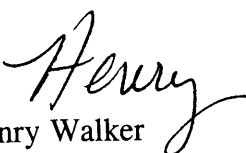
**In Re: Petition of The Tennessee Small Local Exchange Company Coalition
for Temporary Suspension of 47 U.S.C. §251(b) and 251(c) Pursuant
to 47 U.S.C. §251(f) and 47 U.S.C. §253(b)
Docket No. 99-00613**

Dear David.

Please accept for filing the original and thirteen copies of the Comments of US LEC of Tennessee, Inc., Hyperion of Tennessee, LP and the Southeast Competitive Carriers Association's comments regarding the effect of the Eighth Circuit court decision in the above-captioned proceeding.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/nl
Attachment
c: Parties

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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Re: **Petition of The Tennessee Small Local Exchange Company Coalition for
Temporary Suspension of 47 U.S.C. §251(b) and 251(c) Pursuant to 47 U.S.C.
§251(f) and 47 U.S.C. §253(b)
Docket No. 99-00613**

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OFFICE OF THE
EXECUTIVE SECRET

**COMMENTS OF US LEC OF TENNESSEE, INC., HYPERION OF TENNESSEE, LP,
AND SOUTHEAST COMPETITIVE CARRIERS ASSOCIATION**

SUMMARY

At the suggestion of the parties, the Hearing Officer has postponed the hearing scheduled for August 22, 2000 and requested that the parties submit comments addressing the impact on this proceeding of the Eighth Circuit's recent decision in *Iowa Utilities Board, et al. v. FCC*, docket no. 96-3321 (and consolidated cases), filed July 18, 2000. In response, US LEC of Tennessee, Inc., Hyperion of Tennessee, LP, and the Southeast Competitive Carriers Association (collectively, "Intervenors") submit the following memorandum.

The Court's decision struck down FCC rules 51.405(a), (c), and (d). The effect of this decision is that, although the Petitioner still bears the burden of proof, the FCC's definition of what constitutes "undue economic burden" is no longer applicable to this proceeding. It will now be the responsibility of the TRA to define "undue economic burden" in light of the Court's ruling and apply that standard to the facts presented by the incumbent LECs.

Because of this change, the Intervenors request leave to file revised testimony on this point and further ask that a hearing on the merits of this matter be re-scheduled as soon as practical thereafter.

DISCUSSION

The federal Telecommunications Act of 1996 exempts small, incumbent local exchange carriers from some of the interconnection obligations applicable to larger carriers. *See* 47 U.S.C. § 251(f). The Act provides two methods for changing those exemptions: a potential competitor may initiate a proceeding under subsection (f)(1) to remove the incumbent's exemptions or the incumbent itself may initiate a proceeding under subsection (f)(2) to obtain additional protection from competition.

The instant case is a proceeding initiated under subsection (f)(2) by a coalition of incumbent LECs ("Petitioner") to obtain additional protection from competition. The TRA also has before it another proceeding, docket 00-00026, which was initiated by a competitive carrier, US LEC, against an incumbent under subsection (f)(1). The issue at hand, of course, is how the *Iowa* opinion affects the case at bar, not how it affects the US LEC petition.

The section of the Court's opinion concerning rural exemptions is divided into three parts: "1. Prerequisites for Terminating an Exemption," "2. Undue Economic Burden," and "3. Burden of Proof" (slip op., pp. 25-31).

The first part of the Court's opinion concerns proceedings brought by competitive carriers under subsection (f)(1). The Court overturned FCC rule 405(c) which states that, in a proceeding brought under subsection (f)(1), the incumbent LEC must demonstrate that competition "would be likely to cause undue economic burden" (which is one of the statutory criteria) "beyond the economic burden that is typically associated with efficient competitive entry" (which is gloss added by the FCC). The rule does not address the other two statutory standards contained in subsection (f)(1) of the Act. The Court therefore held that the rule "impermissibly disregards" the other

statutory requirements “that must be met before a state commission can terminate an exemption” under subsection (f)(1). *Id.*, at 26-27.

Although this part of the opinion only applies to a proceeding brought under subsection (f)(1), the Court’s ruling implies that in a proceeding brought under subsection (f)(2), such as the case at bar, the state commission must consider all the statutory criteria set forth in subsection (f)(2) of the Act, not merely the “undue economic burden” requirement. That, however, is not an issue at the TRA. The parties have always agreed that the agency must consider all the statutory requirements listed in subsection (f)(2).

In part two of the opinion, the Court held that 405(c) and (d), which interpret the meaning of “undue economic burden,” are inconsistent with the language of the statute. In each rule, the FCC defined “undue economic harm” as harm “beyond the economic burden that is typically associated with efficient competitive entry.” The Court, however, held that state commissions must consider “the whole economic burden” occasioned by competition. *Id.*, at 29. The Court therefore struck down both 405(c), which addresses proceedings brought under subsection (f)(1), and 405(d), which addresses proceedings brought under (f)(2). This is the only part of the Court’s opinion that is directly applicable to proceedings brought under subsection (f)(2).

In part three of the opinion, the Court overturned rule 405(a) which states that, in a proceeding initiated by a competitor under subsection (f)(1), the incumbent LEC bears the burden of proof. *Id.*, at 30. The Court held that “the plain meaning of the statute requires the party making the request [*i.e.*, the potential competitor] to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption.” *Id.*, at 31.

Summarizing its findings, the Court declared, “For the foregoing reasons, we vacate rule 51.405 (a),(c) and (d).” *Id.*

The Court did not address rule 405(b) which states that in a proceeding initiated by an incumbent LEC under subsection (f)(2) — such as the case at bar — the LEC “must prove to the state commission” that it is entitled to additional protection from competition. By implication, however, part three of the Court’s ruling supports rule 405(b) since, as the Court pointed out, the burden of proof should normally rest on “the party making the request” for relief.

CONCLUSION

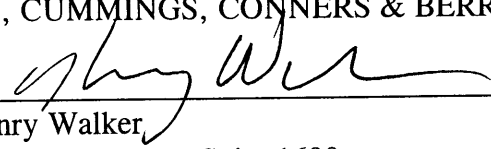
The *Iowa* decision affects this proceeding only in that FCC rule 405(d), which interprets the meaning of “undue economic burden” in a proceeding brought under subsection (f)(2), is no longer in effect and no longer applicable to this case. The Petitioner still has the burden of proof and still must meet all parts of the statutory test set forth in subsection (f)(2) in order to obtain relief. Those criteria are accurately described in the *First Report and Recommendation of the Hearing Officer* filed in this docket on February 8, 2000.¹

The Intervenor request the opportunity to file supplemental testimony in light of the *Iowa* opinion and ask that this case be re-scheduled for hearing as soon as practical.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

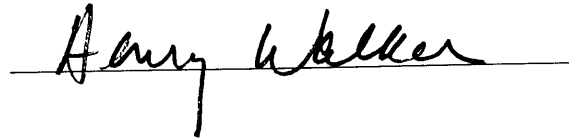

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¹ To conform to the Court’s opinion, the “Amended List of Issues” appended to the *Second Report and Recommendation of the Hearing Officer* issued March 23, 2000, should either be struck or amended again to eliminate the language from FCC rule 405(d).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served via U.S. First Class Mail or Hand Delivery on the parties of record on this the 18th day of August, 2000.

Dale R. Grimes, Esq.
Bass, Berry & Sims
2700 First American Center
Nashville, TN 37238-2700

A handwritten signature in black ink, appearing to read "Amy Walker", is written over a horizontal line.